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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JOHN KERESTES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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John Kerestes respectfully prays that a writ of certiorari issue to review the judgment of the Seventh Circuit entered in the above case on June 20, 1966.

OPINIONS BELOW

The opinion of the Court below (Appendix A, page app. 1) is not yet reported. The District Court did not write or hand down any opinion.

JURISDICTION

The judgment of the Court below was entered on June 20, 1966 (Appendix A, p. App. 1-9). Petition for rehearing by the petitioner was denied July 19, 1966 (Appendix B, p. App. 10). This petition for certiorari is filed within thirty days of the denial of the petition for rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Is an electronic recording of a conversation, delivered to government agents by a government informer witness as a true and correct version of a conversation with a defendant, which conversation is testified about by the witness, in direct examination as a government witness in its case in chief, and the witness is the only person who can verify the truth and accuracy of the recording of the conversation, producible under Section 3500 T.18 U.S.C., and should not the sanctions of that section be invoked where the government does not disclose the recording to the Court of defendants as provided by the statute, and order of the Court?

2. Was the petitioner denied due process and Constitutional rights by refusal to grant a separate trial, when the evidence and trial events made it clear that the petitioner's right to separate consideration of his guilt or innocence of the charges was impossible?

3. Where the petitioner's defense is antagonistic and conflicting with that of the only other one of co-defendants on trial who testifies, and petitioner is powerless to subpoena or compel testimony of other co-defendants on trial who could corroborate him, essentially, on crucial matters, and who choose not to testify, is he not denied protection of the Sixth Amendment, which provides for compulsory process for witnesses in his behalf?

4. Are not the economy and convenience of the Courts and prosecutors outweighed by the need of a defendant for a separate trial to get a fair trial?

5. Where interstate commerce is not obstructed, does the payment of a bribe by a contractor to a city officer come within the purview of Section 1951, T.18, U.S.C., known as the Hobbs Act and the Anti-Racketeering Act?

STATUTES INVOLVED

§ 1951, Title 18, United States Code, Interference with commerce by threats or violence.

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or section 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793.

§ 3481, Title 18, United States Code, Competency of accused

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. June 25, 1948, c. 645, 62 Stat. 833.

§ 3500, Title 18, United States Code, Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States

to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the corrrectness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court

shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595.

STATEMENT OF THE CASE

This is the Petition for Certiorari by John Kerestes from judgment and sentence entered upon a verdict of guilty by a jury on a two-count indictment charging violations of Section 1951, Title 18, U.S.C.

The indictment named five defendants, one, the Mayor of Streator, Illinois, and the other four, including this defendant, were members of the City Council of Streator. Count One charged that commencing on or about November 7, 1960, the defendants, by extortion and obstruction of interstate commerce, attempted to and on May 7, 1961, did obtain a substantial amount of money as a portion of the price for two sewer pumps to be installed in a sewage disposal plant for the City of Streator.

Count Two charged conspiracy to commit the crime charged in Count One. (A. 1-3).

This defendant, John Kerestes, and the other council members moved for severance from the defendant, Mayor Sopher, on the ground that, after arrest, Mayor Sopher had made admissions and statements tending to implicate them, and which statements would not be admissible as heard by the jury if severance was granted. This motion was denied. (A. 4).

A request for particulars was granted in part. (A. 4, 5). Motions for acquittal at close of government evidence and at close of all evidence were denied. (A. 5).

This defendant, Kerestes, renewed his motion for acquittal after verdict, alternatively for new trial, on ground that the Court erred in ruling on the motions for severance; on the motion for bill of particulars; on the charge to the jury; on erroneous admission of evidence; on motions for mistrial including that following the colloquy between the Court and counsel for Sopher during jury arguments; on rulings concerning production of demanded material under 3500, Title 18, U.S.C.; on the motions for acquittal; and on ground that the evidence was insufficient. (A. 5, 6).

The Court sentenced Sopher to four years, and the other defendants, including Kerestes, to three years. (A. 6).

The errors relied on are the obvious prejudice arising from the bitter encounter between the Court and Sopher's counsel in the jury's presence and events leading up to it and its culmination in a sentence of contempt against said counsel, since reversed on appeal. Application of Title 18, Section 3500, U.S.C., and refusal to strike testimony or declare a mistrial; erroneous admission of improper rebuttal; failure to grant severances requested; insufficiency of proper evidence to prove charges made by language of indictment; and errors in instructions to the jury and in refusing proper requests.

EVIDENCE FOR THE PROSECUTION

The government's evidence consisted of the testimony of three salesmen, purporting to describe conversations with Mayor Sopher and the various council members and the testimony of one of the sales representatives, Smith, concerning a conversation and transaction had with Mayor Sopher, alone, long after the delivery and installation of the equipment charged as the subject of obstructed interstate commerce, and substantially after it had been paid for by the City of Streator.

Of the sales representatives, *Charles H. Boender* stated that he entered the promotion of sale of Smith and Loveless sewer pumps equipment on November 7, 1960, in a meeting with Mayor Sopher and councilmen Kerestes, Ryan, Ramza, and Tibbles (A. 7). Boender further stated that after his promotional speech, Sopher asked what it was worth to Sopher for Smith and Loveless to get the job. Someone else said it must be in cash, but Boender did not identify him, and in reply Boender said he would consult his superiors (A. 7).

Boender further testified that he introduced Bowlby, his superior to Sopher on March 29, 1961, and that Sopher told them that "we" went ten percent of the equipment price in cash, and that Bowlby told Sopher that this would require B. Alden Smith's attention (A. 8).

After *Bowlby* took it up with Smith, *Boender* testified that Smith and he visited Kerestes at his employer's funeral home in Streator. Smith asked Kerestes how payment of the 10 per cent could show on the company books, and Kerestes replied that it was Smith's problem and that as far as he was concerned it was a gift with all taxes paid, according to Boender's testimony (A. 8).

Smith testified essentially as did *Boender* concerning this conversation but added that he said he had never done business this way and it would be difficult to account for. According to Smith, Kerestes said "we want cash, tax paid, and it is your problem to get it," (A. 21).

(These conversations with Kerestes, only, were limited in admission to Kerestes, A. 3, 21).

Boender testified that on the day of the Kerestes conversation he and Smith immediately proceeded to see Mayor Sopher, and *Smith* testified that Sopher inquired whether they were going along on the deal. Smith said he told Sopher they did not do business that way and that while he did not say yes or no, he left the impression that he would go along with them (A. 21). Smith said he then went to the FBI and reported the matter.

He was permitted, over objection, to testify that he, Smith, did not feel his company had a chance to obtain the pump contract without payment of 10 per cent of the price (A. 22).

On June 13, 1961, Smith and Loveless received the order for the pumps for a total of $30,868.00 (A. 22).

Smith said that he told Sopher that when all of the money was collected he would complete the deal in a telephone call on *November* 29 *or* 30, 1961, and that final payment by the contractor was received on *February* 15, 1963. Smith then telephoned Sopher, and suggested a meeting at the Water Tower Inn in Chicago for February 27, 1963. Smith testified that Sopher told him he wanted exactly 10 per cent in $50 bills predominately (A. 22).

Smith kept the appointment but Sopher did not appear, and when Smith called him, Sopher said he had forgotten (A. 22). On April 29, 1963, Smith again called Sopher and

they agreed on a meeting at the Water Tower Inn on May 7, 1963, at 5:30 P.M., and Sopher kept this appointment accompanied by his twelve year old daughter (A. 23).

In a conversation later said to be recorded on a wire recorder carried by Smith (A. 54, 56-59), Smith said that Sopher stated that the Commissioners who had not been re-elected, Tibbles and Ryan, were still part of the deal, and knew of the meeting and that the new Commissioners knew nothing of the deal. After various other comments about such deals, Smith gave Sopher $3,087.00 in an envelope whereupon Sopher was arrested by FBI agents (A. 23). At the conclusion of Smith's testimony the transcript shows the Court asked "Do you have the 3500 statements?" and Prosecutor Connelly said the Exhibit Nos. 111-118 for identification had been delivered pursuant to Sec. 3500 of Title 18. (Tr. 293-4.)

The tapes, wire recordings, or transcripts of the recorded conversation with Sopher, which Smith turned over to the FBI were not produced in compliance with Section 3500, T. 18, U.S.C., (A. 51, 52), and the Court refused to examine the materials to determine whether they were producible (A. 52).

Two FBI agents, *Gino Lazzari* and *Robert Tuberson* testified that they listed the numbers of the bills presented by Smith and returned the money to Smith later (A. 26). The agents watched the meeting between Smith, Sopher and Sopher's little daughter and saw Smith and Sopher talk and Smith gave Sopher an envelope, whereupon they arrested Sopher who said the money was a political contribution (A. 27).

The Motion of the defendants for Acquittal at the close of the Government's case was denied (A. 28).

DEFENSE EVIDENCE.

A substantial number of witnesses, of substance in the community of Streator, testified to the good reputation of the defendants for honesty and integrity and as to truth and veracity for Kerestes and Sopher (A. 28).

Dwight Farthing, an engineer, of Streator, said he operated Farthing Brothers, a contracting Company, and that his company had the sewer contract in question (A. 28). Farthing testified that he had chosen Smith and Loveless equipment because it was represented that early delivery was possible and met the prescription of the specifications by Warren and Van Praag. He received no requests from any member of the City government to order it and knew of no reason or influence other than its claimed quality for its designation (A. 30). Although there were several failures of Smith and Loveless equipment and there were compelled replacements by the Company, the material was finally accepted and payment made. He received no pressure from any defendant to pay Smith and Loveless (A. 31).

Farthing further said that he had expressed a preference for Smith and Loveless equipment to Warren and Van Praag, of Decatur, design engineers before the contract was signed (A. 33).

Albert Brensley, an associate of Warren and Van Praag, said his firm designated Smith and Loveless equipment as "base supply", because it was more efficient from his prior experience (A. 34, 35). The witness said payment to Smith and Loveless was held up for failure to perform according to specifications (A. 36).

George Petree, testified that he was a former representative of Stannard Company which sold Smith and Loveless

equipment, and that he had promoted such equipment to Streator as early as 1953 and in 1960 showed movies of the equipment to the Mayor and the council. Petree prepared specifications for the bid of Smith and Loveless and Boender was not connected with such work, to his knowledge (A. 38). No defendant by word or act suggested that there be payment to them for Smith and Loveless obtaining the job. The designation as a "base bid product" was a distinct advantage and he told Smith and Loveless that the plans would permit filling part of the Streator job "out of the book" that is, by standard items (A. 39).

The defendant, *Raymond O. Sopher,* testified that he was the Mayor of Streator during the period involved. Sopher described the development and completion and payments relating to the sewer job substantially the same as had defense witnesses, Farthing and Brensly. While he denied certain conversations testified to by Smith and Boender, he said that financial discussions were purely limited to Smith's and Boender's offers of contributions to the political campaign for 1963 elections (A. 41, 42).

After payments for the pumps were finally completed, Smith called Sopher and suggested a meeting in Chicago to take care of the political contribution matter. After two invitations to meetings which Sopher failed to attend, he did meet Smith at the Little Egypt Room of the Walter Tower Inn at Chicago on May 7, 1963. Within two or three minutes Smith handed him an envelope. They then discussed the Streator election and troubles with the equipment (A. 43).

On cross-examination Sopher said that it was about November 7, 1960, that Boender offered him a political contribution. He did not recall that Boender talked to him *and the other Commissioners* on November 7, 1960. The

equipment was not finally selected by the council or the Mayor but by Warren and Van Praag. Sopher denied that he told Bowlby that his equipment would be accepted only if they got 10 per cent of the price (A. 44, 45).

After questions related to the conversation at the meeting of May 7, 1963, at the Water Tower Inn, the prosecutor switched to a series of questions obviously based on a transcript of verbatim questions in his hands (A. 46). The questions are in the abstract contained in the Appendix at pages A. 46 to 50. Smith answered that he did not recall to these questions purporting to relate verbatim conversation (A. 46).

The Court refused to inquire of the jury concerning the effect of statements made by the prosecutor, to the effect that he was doing pretty well and that the Mayor was still on cross-examination, made during a recess (A. 50). A motion for mistrial was denied.

At this point the Court's attention was called to the prosecutor's use of the transcript of recorded conversation between Sopher and Smith and the defense contention that the recordings were producible under Section 3500, Title 18. The Court stated that he did not previously know of the recording, but ruled the transcript or tape was not producible, and the motion to strike Smith's testimony or for mistrial was denied (A. 51).

This defendant-appellant, Kerestes, and Ramza, Ryan and Tibbles further moved for severance, which was denied (A. 51).

A defense motion for production of the record of the conversations was denied, as was a motion for mistrial for the government's refusal, the Court giving his conclusion that the recordings were not statements under 18 U.S.C. 3500. The prosecutor insisted that the government had

delivered all statements that complied with 18 U.S.C. 3500 (A. 52).

On further cross-examination by counsel for the co-defendants, over objection, Sopher testified that he and the other councilmen viewed the Chicago Pump Company product before the contract was let in June of 1961. That none of the other defendants authorized him to accept contributions on their behalf and he did not tell them he was going to Chicago to get such contribution and he did not relate the tenor of his conversation concering Bowlby's offer to other councilmen. Boender's first offer of a political contribution was out of their presence (A. 53).

Counsel for Sopher asked for production of subpoenaed recordings and transcripts and that since the Court viewed these as similar to photos of conversations, they were objects subject to subpoena, under this view, since the prosecution did not claim them to be privileged. The Court took the government's motion to quash under reservation (A. 53), and denied it shortly thereafter (A. 54).

Isabel Sopher, wife of Mayor Sopher, testified that B. Alden Smith called their home three times between the middle and end of April, 1963 (A. 54).

John Kerestes, this defendant-appellant, testified on his own behalf that he had no knowledge of any attempt to secure money by any member of the council or the Mayor until told on his arrest. He denied any conversations on this subject other than a statement by Smith that he would give him a boat. Kerestes told him he wanted nothing other than that the city get a good installation. Kerestes said he was employed by his father-in-law as an embalmer in a family funeral home business, had graduated from Purdue University in 1951, and served in the Marine Corps (A. 54, 55, 56).

A colloquy regarding a stipulation concerning the wire recording from which a tape recording is abstracted at A. 56, 57. The Court proposed a stipulation that the questions asked on cross-examination by the prosecutor represented an accurate recitation of the portion of the conversation referred to in the cross-examination. His stated reason was that it seemed desirable not to accumulate evidence by playing the entire conversation tape (A. 56). Agreement was not final or complete.

GOVERNMENT REBUTTAL

B. Alden Smith, who testified in the Government case in chief, told of receiving a pocket recording device on May 7, 1963, prior to meeting defendant, Sopher; that he heard the device play and that it truly recorded and portrayed the entire conversation had with Sopher (A. 57).

The *Court* asked if the device remained "on" during the entire conversations and Smith said, "Yes, sir."

On cross-examination Smith admitted he was instructed in use of the machine by the FBI prior to using it. He knew he was to return it with the recording on it to the FBI and was working under FBI direction (A. 57, 58).

Agent *John Golden* of the FBI said the wire recorder was so attached to Smith that Smith could turn it on or off. It was still operating when he recovered it from Smith (A. 58).

Agents Tuberson and Noonan testified that the tape was a copy made from the wire recording and was identical. Noonan admitted he did not know whether the recording reflected all that transpired (A. 58).

The Court then stated that there was a stipulation regarding the prosecutor's reading of statements "in that cross-examination" as being true and correct (A. 59).

Motions for acquittal at the close of all evidence were denied (A. 59).

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit for the following reasons:

1. The Seventh Circuit Court of Appeals, by its decision, has impressed a test for production of witness statements under Section 3500 T.18 U.S.C. which is not in the statute or prior decisions, to wit:

> "It is *not a recital of a past occurrence by a prospective witness* and is not within the general purview of § 3500." (Page 6 of opinion of Court of Appeals.) (Emphasis *infra.*)

2. In the light of the current common use of electronic devices and recordings by the government, it is necessary that this Court rule on whether an electronic recording of a two-party conversation given to Agents by a participant government informer witness as a purported true and accurate recording of a conversation had by the witness and a defendant, with no one else present, in fact, or as an electronic eavesdropper, is producible under Section 3500 T.18 U.S.C., when the witness completes his direct testimony describing the conversation but omitting reference to the recording in the prosecutor's possession.

3. Does not the government's concealment of the delivery to it and possession by the prosecutor while a government witness testifies of an electronic recording of a conversation made by the witness of a conversation testified to by him on direct examination, in the government's case in chief, and failure to produce it on request, and order of the Court, to produce under Section 3500 T.18 U.S.C. require the striking of the testimony of such witness,

or the declaration of a mistrial or some sanction suggested by the cited Statute?

4. The conflict between the economy and convenience of joint trials and the right to a fair trial and separate consideration of one's own innocence or guilt involved in grant or denial of severance to antagonistic co-defendants when the schism in the ranks of the defendants is clear from the arrest, return of indictment and attendant publicity, and the evidence, deserves the attention and review of this Court to prevent injustice.

5. Where a conflict arises between testifying co-defendants, the inability of either, to call the non-testifying defendants on a joint trial destroys the provision of the Sixth Amendment to the Constitution, which provides:

> "• • • the accused shall enjoy the right • • • to have compulsory process for obtaining witnesses in his favor,"

it becomes necessary to decide whether Section 3481 T.18 U.S.C. giving an *accused* the right to be a witness on request and the Fifth Amendment providing:

> "No person • • • shall be compelled in any criminal case *to be a witness against himself,* nor be deprived of life, liberty, or property, *without due process* of law;" (emphasis supplied)

or whether such Constitutional sections control (or even *should*) prevail over a custom of facility of courts and prosecutors which seems to demand efficiency of disposition by joint trial of multiple defendants regardless of the Constitutional and Congressional commandments, 3481 T.18 U.S.C.

5. In the case at bar, the petitioner denied knowledge of any intention or act to secure money from the government informer witnesses, but a co-defendant admitted re-

ceiving money which was immediately seized by government agents, from a man who claimed it as a "political contribution", and three co-defendants did not choose to testify. Thus, the petitioner was denied the testimony of three men who denied each and every material allegation of the charge by their pleas of not guilty, and was thus denied a fair trial. Should he not have a fair separate trial where he could subpoena them?

6. The use of the statute, Section 1951 T.18 U.S.C., as a basis for prosecution of the conduct outlined by the evidence unduly extends the sense and purpose of the law, and seeks an extension of federal jurisdiction over purely local misconduct by petty local officials, not federal under any construction and not really effective on commerce.

7. The trial judge so strongly indicated his disapproval of conduct, possibly justified, by a co-defendant's lawyer, by "landing on him with both feet" in the presence of the jury, A. 64, that none of the defendants could be fairly tried. The incident resulted in a One Thousand Dollar fine on the lawyer, which judgment was reversed by the Seventh Circuit Court of Appeals in a collateral proceeding. Thus, the lawyer escaped, but the defendants went to the jury with the trial judge's castigation ringing in their ears. Did this petitioner, who himself or by counsel was no part of these mishaps, receive a fair trial?

8. An instruction which tells a jury that if it *believes* the testimony of a defendant, it must find the defendant not guilty, shifts the burden of the prosecution to the defense.

If, from the government evidence and the defense evidence, where there is any, it appears that there is a reasonable doubt, then there must be an acquittal.

No matter how slight, or even short of belief, evidence may be, if there is a doubt of guilt, the accused must be acquitted. The defense has no *degree,* like *belief,* of proof as is required of the prosecution which must prove beyond a reasonable doubt (or to a moral certainty). The instruction, it is believed, was erroneously included from civil instructions where the burdens of proof shift and have different nuances.

9. Should not this Court declare that as to joint trials, fair trial for any accused requires a separate trial, if necessary or indicated for fairness.

10. This Court should limit the rising tendency of prosecutors to bring multiple defendant indictments by providing that separate trials be granted to antagonistic defendants. Discretion is too often abused in the name of economy and prosecutive convenience and efficiency, to deny separate consideration of individual guilt or innocence.

ARGUMENT

I.

There Was Substantial And Prejudicial Error in Rulings On Section 3500, Title 18, United States Code.

The deliberate concealment from the Court and defendants of the existence of corroboration by mechanical electrical recording of what Smith said was his conversation with Sopher at the Water Tower Inn induced substantial error which grew into overwhelming circumstances under which the defendant Kerestes and the other councilmen could not get a fair trial.

Nothing in Smith's direct or cross examination indicated existence of such a record and its having been delivered to the F.B.I. by him as such a wire recording.

At the close of the direct examination of Smith, the following occurred (Tr. 293-4):

> "Mr. Connelly: No further questions.
>
> Just one moment. I do have one thing.
>
> The Court: Do you have the 3500 statements?
>
> Mr. Connelly: They have been given to them already, your Honor. Let the record show that the statements of this witness—
>
> The Court: Just give the exhibit numbers, Mr. Connelly.
>
> Mr. Connelly: Yes, your Honor. Government Exhibit 111 for identification, 112 for identification, 113 for identification, 114 for identification, 115 for identification, 116 for identification, 117 for identification,

118 for identification, various dates from April 11, 1961 to May 9, 1963, have been turned over to defense counsel pursuant to Section 3500 of Title 18.

The Court: All right."

This was, of course, an intentional (not charged as corrupt or venal) concealment of the recorded conversation of Smith, the witness, who had delivered to the F.B.I. a recording of what he said and claimed occurred at the meeting.

Nevertheless, the recording which Smith gave to the F.B.I., none of them present, represents the mechanical and electronic recording of Sopher, *but also* that of Smith. It is Smith's statement of what happened, and was so intended by him when he delivered it to the F.B.I.

It is a record within 3500, T. 18, U.S.C.

Refusal to produce such under 3500, Title 18, U.S.C., calls for striking the evidence of the witness or dismissal of the case.

The prosecutor deliberately chose to conceal the record of the conversation at points where it would have been helpful to the defendants for cross examination or in any other way. The Judge improperly, in the presence of the jury, said "Do you have any 3500 Statements"? The prosecutor's unctuous and jury laboring device of insisting on reciting each document produced does not justify appellate forgiveness for failure to produce the recorded statements of Smith and Sopher under Smith's vouchsafe of genuineness to the F.B.I., *Schoppel* v. *United States*, 270 F. 2d 413; and directly on propriety of 3500 T. 18 requests and production before the jury, *Johnson* v. *United States*, (C.A. D.C.) 347 F. 2d 803, 805, 806, decided June 16, 1965.

Later, the record shows the Court said that no knowledge of these recordings had come to his attention (A. 5, Tr. 910-911).

The prosecutor was brave to claim his concealment and said that *he* had turned over to the defense every statement of every witness that complied with Section 3500, (A. 52, Tr. 942-943). His usurpation of the trial Judge's function was complete, *United States* v. *Accardo,* 298 F.2d 133.

The Court below continued in refusal to compel production of these statements or recordings even though they were subpoenaed, which is a substantial request. The statement or recorded statement certainly would have aided the defense in cross examination of Smith, and to the extent that the prosecutor intended it should damage and prejudice, unfairly, all defendants, it could have assisted the co-defendants in cross examination of Sopher.

Brady v. *Maryland,* 373 U.S. 83, 10 L. Ed. 2nd 215, 83 S.Ct. 1194, contains the following:

> "*We now hold* that the suppression by the prosecutor of evidence favorable to an accused *upon request* violates due process where the evidence is material *either* to *guilt* or *punishment, irrespective* of the good faith of the prosecution." (Emphasis supplied).

II.

The Denial Of The Motions For Separate Trial Require A New Trial.

A. The Motion For Severance Before Trial Should Have Been Granted.

From the evidence, obviously in the possession of the government, it was apparent on return of the indictment that a fair trial could not ensue without a trial of the four members of the council of Streator separate from

that of Mayor Sopher. Immediately after his arrest on May 7, 1963 in Chicago, at the Water Tower Inn, Mayor Sopher was vehement and diligent on television, radio and presswise in proclaiming that he had received money from Smith, but that it was a political contribution (A. 27).

These statements to Agents Lazzari and Tuberson of the F.B.I., although limited to Sopher by Court ruling, demonstrate that Kerestes' motion for severance was sound (A. 68-72). Kerestes' motion stated his fear of just such prejudicial material going to the jury upon a joint trial. The fact of Sopher's statements upon arrest were well known to the prosecutors, the Court and the defendant at the time the motions were made, by reason of the exhibits, attached to the motions, which showed newspaper accounts of Sopher's statements and implication of the other defendants, including Kerestes.

Of course, their defenses *were antagonistic*. Kerestes denied all knowledge of any money demands or offers and of Sopher's trips to obtain it. Sopher's defense was that he was obtaining a political contribution for himself and the council members which had been offered by frequent importuning by Smith (A. 27 and see exhibits attached to Kerestes' motion for severance). (A. 4, R. 68-72).

Sopher would not have been a witness upon a separate trial of the other council members, or Kerestes alone, if severance had been granted. All of the damage to his forthright denials of knowledge, participation and criminatory conversations done by Sopher's appearance on the stand, the misused recorded conversation of Sopher and Smith, the altercation between the Judge and Sopher's counsel would have been non-existent in a separate trial

from Sopher. The damage was irreparable. It was discernible at the time of the original motions for separate trial and they should have been granted.

Very simple and brief inquiry of the prosecutors could have satisfied the suspicion of probable prejudice from joint trial that must have been aroused by the motions and the common knowledge of the highly publicized events surrounding Sopher's arrest and statements of purported defense. *Barton* v. *United States,* 263 F.2d 894, 898 (5th Cir. 1959); *United States* v. *Kahaner,* 203 F. Supp. 78, 80-81 (S.D.N.Y. 1962); *Schaffer* v. *United States,* 221 F.2d 17, 19 (5th Cir. 1955); *Brady* v. *United States,* 29 F.2d 312, 313 (8th Circuit).

B. The Evidence And Trial Events Required a Mistrial And Order Of Severance To Kerestes From Sopher.

Of course, the government will contend that the grant of the motions was a matter of discretion not to be disturbed upon appeal. It is contended that under the circumstances in this case there was an abuse of discretion because the subsequent trial events could be forecast easily by exercise of discretion and very slight inquiry by the trial judge.

However, the events of the trial demonstrate without question that it was easily discernible that Kerestes and the other councilmen were irreparably damaged by joint trial with Sopher. His testimony on the stand, to meet the testimony of Smith regarding the meeting of May 7, 1963 at Water Tower Inn and the subsequent disastrous use of the wire recording, Exhibit 14, and the unfortunate resulting events culminating in a finding of contempt against a lawyer, were matters completely outside the control of Kerestes and his fellow councilmen, on trial.

These matters, however, certainly made it clear that it is impossible to say that the verdict against Kerestes did

not in part rest on matters not admissible as to him, and against which he could only be protected by severance from Sopher. It is not sufficient to say that there was sufficient evidence proper against him, if believed, to convict him. It is necessary that the verdict of guilty must have been arrived at free of undue and improper influences and prejudices, even if slight. In this case the improper influences were overwhelming in the eyes of the jurors and far overshadowed the simple defense of Kerestes.

When this situation arose the grant of separate trial was no longer a matter of discretion. It became a right of the defendant collateral to his right to a fair trial. *United States* v. *Haupt,* (C.A. 7), 136 F.2d 661, 673; *Ingram* v. *United States,* 272 F.2d 567; *United States* v. *Decker,* 51 F. Supp. 20, 25, 26.

C. The Inability Of Kerestes In A Joint Trial To Compel Effective Testimony From His Co-defendants Deprived Him Of A Fair Trial And Should Have Caused A Separate Trial.

While afflicted with the problems arising from Sopher's antagonistic defense and testimony and extra-judicial inadmissible statements, Kerestes also suffered from the disadvantage of being deprived of compulsory process for witnesses in his behalf who had knowledge concerning transactions, events and conversations in issue. He was unable under the law to call upon Ryan, Tibbles or Ramza, other co-defendants in the joint trial for their evidence to support his defense.

It is submitted that under the excellent reasoning of the recent decision of this Court in *United States* v. *Echeles,* No. 14774 decided September 2, 1965, it appears that two Constitutional rights are involved to an extent which would bar a joint trial under the circumstances of this case.

The *Echeles* decision reversed because of Echeles' disability to violate his co-defendants' right to incriminate themselves and eligibility for the witness stand *only* at *their* (co-defendants') *own* request.

The cases cited therein make it clear that a defendant may not be called upon to testify at all. *United States Housing Foundation of America, Inc.*, 176 F.2d 665, 666 (C.A. 3); *United States* v. *Keenan*, 267 F.2d 118, 126 (C.A. 7, 1959); *United States* v. *Benjamin*, 120 F.2d 521, 522 (C.A. 2, 1941); *Poretto* v. *United States*, 196 F.2d 392, 394 (C.A. 5, 1952).

Nor may his silence be commented on. *De Luna* v. *United States*, 308 F.2d 140, 141 (C.A. 5, 1962).

Thus, in the case at bar, Kerestes was helpless to require testimony from his fellow councilmen as to the events in issue as to which they had knowledge. Certainly their silence and failure to take the stand prejudiced them and Kerestes despite the Court's mild and sparse instruction against inferences to be drawn from defendant's failure to testify.

The appropriate application of the Sixth Amendment providing for compulsory process for witnesses in his behalf and the protection of the Fifth Amendment and Section 3481, Title 18, United States Code, against compelling a defendant to take the witness stand at his own trial is the grant of separate trial upon request when the government has caused joinder of two or more defendants.

United States v. *Echeles*, (C.A. 7) (Rehearing *En Banc* denied) 352 F.2d 893.

Fifth Amendment.

§ 3481, T. 18, U.S.C.

Sixth Amendment U.S. Constitution.

CONCLUSION

Wherefore, this Petitioner prays this Court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered herein.

Respectfully submitted,

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